

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1948.

THE UNITED STATES, *Petitioner,*

v.

HAZEL L. FAUBER, *Administratrix, C.T.A.*

**BRIEF OPPOSING PETITION FOR WRIT OF  
CERTIORARI.**

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**Supreme Court of the United States**

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No. 625

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THE UNITED STATES, *Petitioner,*

v.

HAZEL L. FAUBER, *Administratrix, C.T.A.*

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**BRIEF OPPOSING PETITION FOR WRIT OF  
CERTIORARI.**

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Respondent, Fauber, opposes the grant of a writ of certiorari on the petition of the United States for the following reason:

1. The Court of Claims in allowing an additional amount to be added to the award, (R. 91) <sup>1</sup> did not decide any question of law in a manner inconsistent with sound principles or governing authority announced by the Supreme Court.

**QUESTION PRESENTED.**

The question presented in the petition (Pet.) <sup>2</sup> is inac-

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<sup>1</sup> Transcript of Record.

<sup>2</sup> Pet.—Petition for Writ.

curate, since it does not reflect the actual holding of the Court of Claims. The Court did not include, as part of respondent's compensation, an award of interest, *as such*, dating from the time of the infringement. Respondent submits that the question actually presented should be phrased as follows:

Whether, under a statutory authorization to sue for "reasonable and entire compensation" (35 U.S.C. 68; now 28 U.S.C. 1498) a patent owner's recovery from the United States for the unauthorized use of his invention may include, in addition to a reasonable royalty, an additional amount, conveniently determined by figuring a reasonable rate of interest, allowed, not as interest, but as part of entire and just compensation.

### **STATEMENT.**

Suit was brought by respondent under the Statutes of 1910 and 1918, and under a Special Act of Congress, Private—No. 416—71st Congress (R. 1, 2), which Special Act, approved March 3, 1931, conferred jurisdiction on the Court of Claims and provided that "notwithstanding the lapse of time or the Statute of Limitations", the Court of Claims should "hear, examine, adjudicate, and render judgment" under the Act of 1910, and 1918 (R. 2).

The case proceeded in the Court of Claims in a not unusual manner insofar as progress was concerned. Proceedings were suspended July 1, 1942 on motion of petitioner, based on a letter from the Acting Secretary of Navy to the Attorney General dated June 27, 1942, which letter indicated it would be injurious to public interest to comply with calls made by respondent for material in the hands of the Navy Department as long as the war continued. The motion for stay was granted and not until November 16, 1945 was the case restored to active status and referred to a Commissioner (R. 77).

In view of the large number of hulls and floats (256) involved in the calls made on the Navy Department by re-

spondent, proceedings on the accounting were, of necessity delayed. Some fifty (50) hulls and floats (Exhibit 39, R. 77) were considered and finally the Court passed on twenty-six (26) types of hulls and held them to be infringements of validated claim 4 of the second patent in suit and thus within the accounting (R. 77). All of these different hulls and floats were carefully tabulated by the court (R. 77-79). Review of all the different types, and consultation and agreement with the Navy Department to winnow out as exhibits those which were to be submitted to the Court and twenty-six (26) of which were the Court held to be infringements, consumed a very considerable amount of time.

On April 10, 1942, a year after the Court of Claims had rendered its interlocutory opinion on the questions of validity and infringement, petitioner filed a motion for new trial based on alleged newly discovered evidence. By order of June 1, 1942, the court overruled the motion, stating that the alleged newly discovered evidence contained no disclosure anticipatory of claim 4 of the patent and that the Long article relied on in the motion was merely cumulative of disclosures originally before the Court and on which the findings and opinion were based. That if the Long Article had been in evidence it would not have changed the result. (R. 72, 83, Finding 22).

### **The Question of Diligence.**

For the first time in the history of this case petitioner (Pet. 6) raises the question of delay in instituting suit. Nowhere in the proceedings in the Court of Claims was a charge of laches made. The record there, the briefs of petitioner, and the interlocutory and final hearings do not bring it up, and in the accounting proceedings before the Master no reference is made to delay in bringing suit as affecting respondent's right of recovery.

The petitioner's brief (p. 6) states "no reason appears for this delay of 15 years in institution of suit."

Plaintiff was under no rule requiring explanation for delay. The Special Act of the 71st Congress (Private—416—R. 1, 2) expressly authorized the filing of the suit and removed any disabilities of respondent because of lapse of time or statutory limitations. Congress authorized the filing of the suit, and the Government cannot now be heard to complain of the delay, deliberately excused by Congress.

However, Fauber's diligence is confirmed by the Record here. At page 60 the following letter of February 15, 1940 from the Secretary of War to the Chairman of the Senate Committee on Claims is reproduced:

"It can be said in his favor, however, that from the time he made his formal claim *Mr. Fauber showed due diligence at all times* in his efforts to accomplish settlement by negotiation.

"I am mindful of the fact that the present claimant in whose interest the bill has been introduced, *has not been guilty of laches*".\*

The infringement was deliberate and willful. As early as August 8, 1917, Fauber was seeking adjustment of his claim in an effort to avoid litigation by suit against the Government, which, as a loyal citizen, he wished to avoid. He continued to negotiate the matter, but to no avail. After his death, his widow, respondent here, brought suit under the Special Act of Congress hereinbefore referred to.

The reference in the Statement (p. 6) in the Government's petition to the delay in instituting suit is completely immaterial and uncalled for, since any delay which may have occurred was specifically excused by the Special Act of Congress.

#### Decisions Below.

The Court of Claims, in its interlocutory opinion, made Findings of Fact and, upon those findings, announced a Conclusion of Law (R. 11-55), in an extended and well con-

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\* Emphasis supplied unless otherwise indicated.

sidered opinion in which a painstaking review of the patents involved and the defenses was made, and held, as a conclusion of law, that petitioner infringed claim 4 of respondent's patent No. 1,024,682, and that "under the Act of June 25, 1910, 36 Stat. 451, as amended by the Act of July 1, 1918, 40 Stat. 705, and Section 155 of the Judicial Code", respondent "is entitled to a compensation for the unauthorized use by the United States of the invention disclosed" (R. 55).

In its final opinion, on the accounting phase of the litigation (R. 73-91), the Court of Claims found that the total number of flotation units delivered during the accounting period and for which the United States, petitioner, is responsible and for which respondent is entitled to recovery, to be 2,354, having a total value of \$5,912,400 (R. 79).

In this final opinion, the Court of Claims awarded respondent  $1\frac{1}{2}\%$  of the total valuation (\$5,912,400) amounting to \$88,686 (R. 84). The Court below allowed "an additional amount," calculated at 4% per annum, beginning January 1, 1918, on the award as stated in the yearly amounts set forth in finding 24 (R. 84), this additional amount "being allowed *not as interest but as a part of entire and just compensation*". (R. 85).

Respondent contended that, on the basis of the license agreement with The Electric Launch Company (R. 79 et seq.), held relevant by the Court of Claims (R. 90) over petitioner's protests, respondent was entitled to a greater percentage than the  $1\frac{1}{2}\%$  given by the Court of Claims on the value (\$5,912,400) of the infringing units.

In finding 19 (R. 82) the Court, in commenting on the Electric Launch Company license, pointed out that the royalty rate there agreed on in respect of both patents, would have been 16% of the cost of the hull and that the  $2\frac{1}{2}\%$  royalty rate allocated to the patent before the Court of Claims (Finding 18) thus became 8% when based on the value of the hull alone. It has been respondent's contention that the  $1\frac{1}{2}\%$  by the Commission on accounting

was not commensurate in view of the percentages found by the Court to have accrued to respondent under the Electric Launch Company agreement. In support of that contention, respondent relied on the following cases decided by the Court of Claims:

"If the plaintiff has already established a royalty by a license or licenses, he has himself fixed the average of his compensation, and if that has been established prior to the infringement, the task of the Court then becomes easy." *Marconi Wireless Telegraph Co. of America v. United States*, 99 Ct. Cls. 1". *Carley Life Float Co. v. United States*, 74 Ct. Cls. 682.

These cases seem to fix the rule that an established royalty such as respondent had with Electric Launch Company establishes compensation for the use of the patent.

With respect to the question of the additional sum which the trial court allowed in the instant case which was calculated as interest, and was to be added to the main award, the Court of Claims made the following statement:

"The fifth contention of defendant is that plaintiff is not entitled to interest on the value of the Fauber invention which the Government appropriated and has used over a number of years. Interest, as such, has never been allowed in cases such as this, but under the decision in *Waite v. United States*, supra, the reasonable and entire compensation provided by the Act of 1910, as amended (35 U. S. C. 68), to a patentee includes a sum in addition to the value or reasonable royalty at the time of the appropriation and use of his invention, which, for convenience, is customarily measured and calculated at a reasonable rate of interest from the date or dates of the infringing acts. This additional amount is not added as interest but is allowed in order to make the compensation to the patentee entire or just, under the statute which authorized suit and assumed an obligation to pay reasonable and entire compensation whenever the Government manufactured or used a patented invention contemporaneously with such appropriation. Cf. *Crozier v. Krupp*,

224 U. S. 290, 304; *Olsson v. United States*, 87 C. Cls. 642; Royalty Adjustment Act, October 31, 1942 (35 U.S.C.A. 89-90); Air Corps Act of July 2, 1926, as amended by the Act of March 3, 1927 (10 U.S.C.A. 310 (i))." (R. 90).

The Court, of course, simply followed the practice approved by this Court in *Waite v. United States*, 282 U.S. 508, 509, in construing the amendment of 1918 to the Act of 1910.

The Act of June 25, 1910 did not use the word "entire", and the patent owner could sue either the Government contractor or the United States in the Court of Claims. *Wm. Cramp and Sons v. International Curtis*, 246 U. S. 28. A primary purpose of the amendment of the Act of July 1, 1918 (Chap. 114 40 Stat. 704, 705; 35 U.S.C. 68) was to confine the recovery of the patent owner to suit in the Court of Claims and to avoid interference with Government contractors by prohibiting suit against the latter. *Richmond Screw Anchor Co. v. United States*, 275 U. S. 331.

A second purpose of the amendment of July 1, 1918 was stated, in *Waite v. United States*, *supra* to be as follows:

"In addition to the purpose of the word (entire) adverted to in *Richmond Screw Anchor Co. v. United States*, 275 U.S. 331, 343, we cannot doubt that it was intended to accomplish complete justice as between the plaintiff and the United States".

Under the second or additional purpose of the Act, this Court deliberately held

"The statute grants 'recovery of his reasonable and entire compensation for such use'. We are of the opinion that interest should be allowed in order to make the compensation 'entire'."

## ARGUMENT.

The "reasons" advanced by the Government for granting the writ are based upon three contentions, (1) that the allowance of "interest" imposes a greater liability for patent infringement upon the Government than the law imposes upon a private infringer; (2) that the allowance of "interest" is prohibited by Section 2516 (a) of the new Judicial Code, Title 28, U.S.C.; and (3) that the Court of Claims, in uniformly following the mandate of this Court in *Waite v. United States*, has awarded "interest" in many patent infringement cases against the Government, to the financial detriment of the United States.

We shall demonstrate that all of these arguments are without merit and fail to present any valid reason for granting the writ.

### Summary of Argument.

1. The allowance of interest from the time when the infringement occurred, in private patent litigation, is specifically authorized in the statute relating to damages in patent infringement cases, now in effect and in effect when the judgment in this case was entered. (R. S. 4921, 35 U.S.C. 70; as amended August 1, 1946, Ch. 726, Sec. 1, 60 Stat. 778). Hence, the Government is in exactly the same position as a private infringer.

2. The prohibition in the new Judicial Code against interest is not an innovation in the law, but is a mere re-codification of old provisions, in effect when the *Waite* case was decided. Hence, the enactment of the new code does not justify over-turning settled practice, established and continued for many years under the old.

3. Congress has not seen fit to change, by legislation, the interpretation of the Court of Claims patent statute (35 U.S.C. 68) adopted by this Court in *Waite v. United States* and consistently followed by the Court of Claims for eighteen years. On the contrary, the statute has been re-

pealed and re-enacted, repeating the exact language upon which the interpretation was based (28 U.S.C. 1498). This re-enactment constitutes legislative adoption of this Court's previous judicial interpretation. Hence, a different interpretation at this time by this Court would be improper, as constituting judicial legislation.

# I

The Government's brief in support of the petition argues that the practice of refusing an award of interest in private patent litigation was settled by this Court's decision in *Duplate v. Triplex*, 298 U.S. 448, at a date subsequent to this Court's decision in *Waite v. United States* (282 U.S. 508) allowing "interest" in patent cases in the Court of Claims; and that the Government should not be subject to greater liability for patent infringement than a private defendant.

Whatever may have been the effect of the Court's decision in the *Duplate* case on the award of interest in private litigation under the former patent statute, need not be considered, since that statute is no longer in effect, and the question is moot. The statute (R.S. 4921; 35 U.S. 70) was amended by the Act of August 1, 1946, Chapter 726, Section 1, 60 Statutes 778.

The statute, as it stood when the decision of this Court in the *Duplate* case was rendered, contained no provision for the award of interest, but was limited to "profits" and "damages" and in certain cases, provided for "a reasonable sum as profits or general damages for the infringement".

One of the specific purposes of the amendment of August 1, 1946, was to make the basis of recovery, "*due compensation*" for infringement, together with *interest from the time the infringement occurred*.

The intent of Congress clearly was to adopt for private patent litigation, the practice prevailing in the Court of Claims, since the word "compensation", which appears in

the Court of Claims statute (35 U. S. C. 68, now 28 U.S.C. 1498) was transported to the general damage statute for the first time. Moreover, the bill which resulted in the new statute (H. R. 5231, 79th Congress, Second Session) was originally entitled

"A bill to amend revised statutes 4921 (U.S.C.A. Title 35, Patents, Sec. 70) providing that damages be ascertained on the basis of compensation for infringement, *as in actions for infringement in the United States Court of Claims*".

The words, "as in actions for infringement in the United States Court of Claims" were eliminated by amendment, as unnecessary, but the original intention remained. (See report of hearings before the Committee on Patents, House of Representatives, 79th Congress, Second Session on H. R. 5231, January 29, 1946).

The report of the Senate Committee on Patents, report No. 1503, calendar No. 1529, 79th Congress, Second Session, adopted the report of the House Committee on Patents, made after hearings on H. R. 5311 (report No. 1587). The significant portion of the House Committee report, adopted by the Senate Committee on Patents, is as follows:

"The object of the bill is to make the basis of recovery in patent-infringement suits general damages, that is, any damages which the complainant can prove, not less than a reasonable royalty, *together with interest from the time the infringement occurred*, rather than profits and damages."

The following specific language in the Act as approved makes this intent manifest:

"\* \* \* the complainant *shall be entitled* to recover general damages which shall be due compensation for making, using, or selling the invention, not less than a reasonable royalty therefor, together with such costs, *and interest*, as may be fixed by the Court. The Court may in its discretion award reasonable attorneys fees to the prevailing party upon entry of judgment on any patent case."

The original bill (H.R. 5231) employed the following language:

"\* \* \* the complainant shall be entitled to recover general damages which shall be due compensation for making, using, or selling the invention, not less than a reasonable royalty therefor, together with his costs and *expenses* and *interest* from the time the infringement began."

After the hearings before the House Committee on Patents, this language was amended to read:

"\* \* \* the complainant shall be entitled to recover general damages which shall be due compensation for making, using, or selling the invention, not less than a reasonable royalty therefor, together with his costs and reasonable attorney's fees *to be fixed by the Court* and interest from the time the infringement occurred."

The hearings show that the original expression "*expenses*" was thought to be too general and indefinite, and the words "attorney's fees *to be fixed by the Court*" were substituted.

In the Senate, the language was amended to read as quoted above, p. 10, to make it clear that the award of attorney's fees was *discretionary* with the Court.

It is clear from the legislative history, that it is mandatory for the Court to fix the costs *and interest*, but that the award of attorney's fees is discretionary with the Court.

The report of the Senate Committee on Patents said:

"By the second amendment the provision relating to attorney's fees is made discretionary with the court. It is not contemplated that the recovery of attorney's fees will become an ordinary thing in patent suits, but the discretion given the court in this respect, in addition to the present discretion to award triple damages, will discourage infringement of a patent by anyone thinking that all he would be required to pay if he loses the suit would be a royalty. The provision is also made general so as to enable the court to prevent a gross injustice to an alleged infringer."

No change respecting the award of interest from the time the infringement occurred was intended by the amendment. This is clear from the fact that no mention thereof was made in the report and from the fact that the Senate Committee adopted the report of the House Committee on Patents, which stated that the object of the bill was to make the basis of recovery "general damages \* \* \* together with interest from the time the infringement occurred \* \* \*."

This is the exact basis of the recovery awarded by the Court of Claims in the present case. Hence, the Court did *not* allow "a greater recovery against the United States than against a private litigant", as alleged in the Government's petition, p. 10, but allowed exactly the same recovery as the law prescribes in private litigation.<sup>3</sup>

The entire argument in the Government's brief, based upon *Duplate v. Triplex, supra*, falls, in view of the change in the statute since the date of that decision.

The Government attacks this Court's decision in the *Waite* case on the contention that it was based upon a *concession* by the Government that interest should have been allowed; and that the concession was based on a belief that, in private litigation, interest would have been allowed. We have demonstrated, above, that such a concession today would be entirely justified, since the statute (35 U.S.C. 70) as amended, specifically provides for the allowance of interest in private litigation.

However, it seems fantastic for the Government to argue that this Court, in the *Waite* case, based its ruling on a concession by the Government, in complete disregard of applicable legal and equitable principles. The ruling dealt

<sup>3</sup> The Act of August 1, 1946 was in effect when the judgment in this case was entered on December 6, 1948. The act provided "this act shall take effect upon approval and shall apply to pending causes of action in which the taking of the testimony has not been concluded \* \* \*". The act was approved August 1, 1946. The testimony on the accounting in this case was taken on January 20, 21, 22 and 27, 1947 and the evidence on both sides was closed January 27, 1947. (R. 94-97)

with the case on the facts presented and the law having to do with such a state of facts. It is absurd to contend that, since the Government conceded certain legal principles, the Court had nothing to do but decide in favor of the claimant. It is submitted that this Court looks beyond any such concessions or admissions and interprets the statutes and applies the law in order to do justice to the litigants. The argument that the concession by the Government in the *Waite* case was the controlling thing, is without weight.

In *Phelps v. The United States*, 274 U.S. 341, this Court held that:

"\* \* \* Section 177 does not prohibit the inclusion of the additional amount for which petitioner contends. It is not a claim for interest within the purpose or intention of that section. Acts of Congress are to be construed and applied in harmony with and not to thwart the purpose of the Constitution. The Government's obligation is to put the owners in as good position pecuniarily as if the use of their property had not been taken. They are entitled to have the full equivalent of the value of such use at the time of the taking paid contemporaneously with the taking. As such payment has not been made, petitioner is entitled to the additional amount claimed. *Seaboard Air Line R. Co. v. United States*, 261 U. S. 306 (67 L. Ed. 669, 43 Sup. Ct. Rep. 354); *Brooks-Scanlon Corp. v. United States*, 265 U. S. 106, 123, 68 L. Ed. 934, 941, 44 Sup. Ct. Rep. 471; *Liggett & M. Tobacco Co. v. United States*, 274 U. S. 215, ante, 1006, 47 Sup. Ct. Rep. 581." *Phelps v. United States*, 274 U. S. 341, 344.

These rulings, supporting the finding of the Court of Claims for the additional amount to be added to the award, have not been overruled by any later decisions of this Court dealing with a similar state of facts. Petitioner relies on the case of *United States v. Thayer-West Point Hotel*, 329 U. S. 585 in which case the Court of Claims allowed inter-

est at 4% per annum. The Supreme Court reversed that decision, relying on Paragraph 177 (a) of Judicial Code. This decision is not applicable to respondent's case. In *United States v. Thayer*, there was a contract between the United States and respondent for hotel property which provided for lease of the property on which the hotel was erected for the benefit of the Military Academy. The lease was assigned and Thayer took the property. In 1943, the lessee found operation of the hotel impossible and, in accordance with the provisions of the lease, promptly turned the property over to the Government. In the case of respondent, the property was unlawfully taken and used by defendant. There was no question of contract under which the parties acted, as in the West Point Hotel case.

In *United States v. New York Rayon Importing Company, et al*, 329 U. S. 654, the Court of Claims awarded interest and this Court held that it should not have been allowed. In the Rayon case, the suit was for a refund of customs collections paid under protest. There was no taking of property, as in the instant case, but merely a claim for a refund. That refund was made, but interest was disallowed. There is a clear distinction between these cases and respondent's case, and the decision in the *Waite* case is still the rule.

The decision in *United States v. Goltra*, 312 U. S. 203, did not overrule the decision in the *Waite* case. In the *Goltra* case, compensation was awarded under a special act for the taking by the Government of property owned by it but leased to the claimant. The act said nothing about interest and this Court held that it could not be allowed. The Court distinguished from *United States v. Creek Nation*, 295 U. S. 103 and *Sho-Shone Tribe v. United States*, 291 U. S. 476, in both of which cases there was a special jurisdictional act, although in neither one of these cases was interest mentioned. In the *Goltra* case, the Court did not overrule the principle upon which interest had been awarded as part of just compensation in the *Creek Nation*

and *Sho-Shone Tribe* cases, both based on special acts, with no mention of interest.

In the instant case, based on a special act not mentioning interest, the Court of Claims followed the rule in *Waite* and awarded an additional amount to make complete and entire the compensation.

With respect to the decisions relating to private patent litigation, on which petitioner relies and sets up on page 9 of the petition, it would seem that insofar as *Mowry v. Whitney*; *Tilgham v. Proctor*; and *Crosby Valve Company v. Safety Valve Company* are concerned, they can hardly serve as precedents against the later decision in the *Waite* case, dealing specifically with a patent infringement claim against the Government.

## II

The second reason advanced by the Government for the allowance of the writ is that Section 2516 of the new Judicial Code, 28 USC, prohibits the allowance of interest.

The new Judicial Code, Section 2516, effective September 1, 1948, did not change the substantive law, as to interest, but simply constituted a reenactment of the law previously in effect, and under which the award of an additional amount, not as interest, but to make the patent owner's compensation "reasonable and entire" was specifically authorized in the *Waite* case. Footnote 4 at page 15 of the petition acknowledges that similar prohibitions against the award of interest, as such, have been in effect since 1863.

Former Section 284 of Title 28 USC (1940 ed.) provided

"(a) No interest shall be allowed on any claim up to the time of the rendition of judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest, except as provided in Subdivision (b)."

Subdivision (b) and former Section 284 of 28 USC provided for interest in certain cases of overpayment under

the Internal Revenue law and similar provisions were found in Section 3771 of Title 26 USC. Hence, in the revision of the Judicial Code in 1948, reference to these sections was omitted and the following language substituted

“\* \* \* or act of Congress expressly providing for payment thereof.”

As showing that no change in substance was made by the enactment of Section 2516 of Title 28 USC, the following is quoted from the Reviser's Notes, appearing at page 1925 of Title 28, United States Code, Congressional Service, pages 1487-2174, 80th Congress—Second Session, published by West Publishing Co. and Edward Thompson Co.

“Section 2516—Section Revised

“Based on Title 28 USC, 1940 ed., Section 284 and Section 226 of Title 31, USC 1940 ed., Money and Finance \* \* \*

“Subdivision (b) of section 284 of title 28 USC, 1940 ed., was omitted as covered by section 3771 of title 26, USC, 1940 ed., Internal Revenue Code. Such omission required the exception in subdivision (a) of such section 284, reading: ‘except as provided in subdivision (b)’, to be changed to read: ‘or Act of Congress expressly providing for payment thereof’.

“Subsection (b) of this section is based on the last sentence of section 226 of title 31, USC, 1940 ed., Money and Finance.

“Changes were made in phraseology”.

Thus, the law has not changed since 1931, when Justice Holmes rendered the unanimous decision of this Court in the *Waite* case, holding that the Act of 1910, as amended in 1918 (35 USC 68) authorized the award of an additional percentage over and above the principal sum, not as interest, but as a part of entire and just compensation.

### III

The Government seeks reversal of the practice authorized in the *Waite* case on the contention that the Court of

Claims has uniformly followed the *Waite* decision and will continue to do so in the future, to the financial detriment of the Government. This, of course, is not a valid "reason" for granting the writ; but would be a matter for legislative action by Congress, if Congress should agree with the Government's contention that the liability for patent infringement should be less than prescribed by the *Waite* decision.

Instead of taking steps to change the doctrine of the *Waite* case, or otherwise lessen the liability of the Government for patent infringement, Congress has specifically ratified, by legislative action, the rule of the *Waite* case and the settled practice adopted by the Court of Claims thereunder.

By the Act approved June 25, 1948, effective September 1, 1948, Chapter 646, Special Law 773, the former statutes giving the Court of Claims jurisdiction in suits against the United States for patent infringement (35 U.S.C. 68) were repealed and were re-enacted as Section 1498 of the new Judicial Code, Title 28 U. S. C.

The old law is quoted at pages 2 and 3 of the Government's Petition in this cause and need not be repeated, except to note that the statute provided that the patent owner's

"remedy shall be by suit against the United States in the Court of Claims for the recovery of his *reasonable and entire compensation* for such use and manufacture; \* \* \*."

Section 1498 of the new Judicial Code specifies

"The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States for the recovery of the *reasonable and entire compensation* for the use or manufacture of an invention covered by a patent of the United States which has been used or manufactured by or for the United States without license of the owner thereof or lawful right to use or manufacture the same."

It is a fundamental principle of statutory interpretation that the re-enactment by Congress of particular language in a former statute constitutes a legislative enactment of the interpretation given to that language by the court in the intervening period.

In the *Waite* case the Court said:

"The statute grants 'recovery of his reasonable and entire compensation for such use'. We are of the opinion that *interest should be allowed* in order to make the compensation '*entire*'."

The Court of Claims has uniformly followed the rule of the *Waite* case, in the decisions cited at page 17 of the Government's Petition.

Petitioner, as pointed out, persists in referring to the added amount "as interest." It is not *interest*. This Court and other Courts have so announced in the cases referred to. Calculating interest is merely a convenient method of arriving at a figure which will make compensation just, reasonable, and entire. (*Seaboard Air Line Co. v. United States*, 261 U. S. 299, at 306).

At one time 6% was the percentage used. In *Shearer v. United States*, 101 Ct. of Cls. 196, 5% was adopted. In respondent's case 4% has been given. Whatever the varying rate, this Court and the lower Courts have always computed the additional amount in this manner to give the successful claimant full measure of recovery.

Petitioner (Pet. 17) expresses concern over the fact that the added amount exceeds the award. This is idle argument. The fact that there has been such an accretion is not respondent's fault. Had Fauber's earnest and unceasing efforts to negotiate a settlement been entertained, suit would not have been necessary and the additional amount, if any, would have been nominal. In all such cases it has never been the practice of the Courts to penalize the successful litigant because of the inevitable delay in final judicial disposition of the case.

When Congress re-enacted the identical language in the new Judicial Code, effective September 1, 1948, it adopted the judicial interpretation of the language, and gave it statutory force.

In *The Dollar Savings Bank v. United States*, 86 U.S. 227, 241, October 1873, this court said:

“\* \* \* It is, doubtless, a rule that when a judicial construction has been given to a statute, the re-enactment of the statute is generally held to be in effect, a legislative adoption of that construction.”

In *John H. Sessions v. John M. Romadka et al*, 145 U.S. 29, 52, October 1891, this court said:

“\* \* \* Congress having in the Revised Statutes adopted the language used in the Act of 1837, *must be considered to have adopted also the construction given by this court to this sentence, and made it a part of the enactment.*”

In *John C. Heald v. District of Columbia*, 254 U.S. 20, 22, 65, L. ed. 106, 111, October 1920, this court held:

“In addition, as the paragraphs of Sec. 250 in question but re-enact provision of prior statutes which had been construed as conveying authority to review controversies concerning the constitutional power of Congress to enact local statutes (*Parsons v. District of Columbia*, 170 U.S. 45, 42 L. ed. 943, 18 Sup. Ct. Rep. 521; *Smoot v. Heyl*, 227 U.S. 518, 57 L. ed. 621, 33 Sup. Ct. Rep. 336), the proposition conflicts with the settled rule that *where provision of a statute had previous to their re-enactment, a settled significance, that meaning will continue to attach to them in the absence of plain implication to the contrary.*”

In *Benjamin F. Johnson v. Manhattan Railway Company*, 289 U.S. 479, 500, 77 L. ed. 1331, 1346, October, 1932, this court held:

“The practice of the Senior Circuit Judges here described and the decision just mentioned amounted to

a practical construction of the provision in question in keeping with its literal meaning. In 1922, after that construction had prevailed and been acted on for several years, the provision was re-enacted by the Congress as part of an act dealing with other assignments of judges to the District Courts. The reenactment was without any change indicative of a disapproval of the prior construction by the Senior Circuit Judges. In such circumstances, as this Court often has pointed out, reenactment operates as an implied legislative approval of the prior construction—in other words, as a *reenactment of the statute as before construed.*”

To the same effect are the following decisions of this court:

*United States v. Catharine I. Gillis*, 95 U. S. 503, 505, 506; *United States v. Charles Bowen*, 100 U. S. 631, 632; *Richard C. Greenleaf v. John Z. Goodrich*, 101 U. S. 845, 846; *New York, New Haven, & Hartford Railroad Company v. Interstate Commerce Commission*, 200 U. S. 402, 50 L. ed. 525; *Copper Queen Consolidated Mining Company v. Territorial Board of Equalization of the Territory of Arizona*, 206 U. S. 474, 479, 51 L. ed. 1143, 1147; *George S. Latimer v. United States*, 223, U. S. 501, 504, 56 L. ed. 526, 527; *M. Anderson v. Pacific Coast Steamship Company*, 225 U. S. 187, 198, 56 L. ed. 1047, 1053; *United States of America v. Edward Ryan*, 284 U. S. 167, 175, 76 L. ed. 224, 228; *Old Colony Railroad Company v. Commissioner of Internal Revenue*, 284 U. S. 552, 557, 76 L. ed. 484, 487; *Corinne S. Koshland v. Guy T. Helvering*, 298 U. S. 441, 445, 80 L. ed. 1268, 1272, 1273; *United States of America v. Elgin Joliet & Eastern Railway Company*, 298 U. S. 492, 497, 80 L. ed. 1300, 1301; *State of Missouri v. John T. Ross*, 299 U. S. 72, 75, 81 L. ed. 46, 49.

The foregoing cases demonstrate a deliberate intent by Congress to adopt the doctrine of the *Waite* case as positive legislation, when the language of the Act of 1910, as amended in 1918 (35 U. S. C. 68) was re-enacted in the new

Judicial Code, Title 28, Section 1498, since that doctrine was well established, had been in effect for nearly eighteen years and had been consistently followed by the Court of Claims, as asserted in the Government's petition, page 17. Hence, the third reason advanced by the Government for the issuance of the writ, in fact, constitutes a controlling reason for its refusal.

### CONCLUSION.

It is submitted that the petition for writ of certiorari should be denied.

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